Supreme Court, U.S.
FILED

JUN 15 2001

OFFICE OF THE CLERK

No. 00-1810

In The

Supreme Court of the United States

WALTER JEFFERSON,

Petitioner,

vs.

CAPTAIN D'S RESTAURANT a/k/a SHONEY'S, Inc. and TPI RESTAURANTS, Inc.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee

RESPONSE TO PETITION FOR CERTIORARI

THE HARDISON LAW FIRM, P.C.
WILLIAM B. WALK, JR. (#13989)
119 South Main Street, Suite 300
Memphis, TN 38103
(901) 525-8776
Attorney of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

On June 5, 1992, the plaintiff, Walter Jefferson, filed a Complaint in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis naming Captain D's Restaurant a/k/a Shoney's, Inc. and TIP Restaurants, Inc. as co-defendants. (Complaint, filed June 5, 1992). In his Complaint, Mr. Jefferson alleged that he was injured when he slipped and fell on the premises of the defendants on July 18, 1991. (Complaint, filed June 5, 1992). On June 21, 1994, the Honorable George H. Brown, Jr., Shelby County Circuit Court, entered an Order of Dismissal Without Prejudice due to the plaintiff's failure to prosecute his claim. (Order of Dismissal, entered June 21, 1994).

On September 23, 1994, plaintiff timely filed his second Complaint in Shelby County Circuit Court in which he essentially repeated the allegations from the original Complaint. (Second Complaint, filed September 23, 1994). Almost three years later, on June 23, 1997, the Honorable Robert L. Childers, Shelby County Circuit Court, entered an Order of Non-Suit dismissing the second Complaint. (Order of Non-Suit, entered on June 23, 1997). On June 17, 1998, nearly seven years after the date of the alleged slip and fall, the plaintiff filed a third Complaint in Shelby County Circuit Court (the applicable statute of limitations for this type of action is one year). This third Complaint was subsequently dismissed on defendants' Motion for Summary Judgment, heard on August 19, 1999. Plaintiff appealed the trial court's ruling to the Tennessee Court of Appeals at Jackson, Tennessee. On August 16, 2000, the Tennessee Court of Appeals sitting at Jackson affirmed the trial court's decision. The Tennessee Supreme Court

denied plaintiff's application for certiorari. Plaintiff now seeks application for certiorari before this Honorable Court on the basis of a perceived denial of due process pursuant to the United States Constitution. Respondent respectfully disagrees that plaintiff has been denied due process or that his application before this Court is proper.

ARGUMENT

Considerations governing applications for certiorari before the Supreme Court are contained in Rule 10 of the Supreme Court Rules. A petition will be granted only for compelling reasons. Further, while not controlling, the character of the reasons are defined in three categories:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should

> be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In this case, plaintiff contends that he was denied due process because he was only allowed to file his suit two times instead of three. Plaintiff does not say whether the perceived denial of due process is procedural or substantive. However, it is clear that none of the criteria contained in Rule 10 of the Supreme Court Rules nor other compelling factors exist and Petitioner's application should be summarily denied.

Appellant contends that the trial court's dismissal of his lawsuit was in contradiction to Rule 41 of the Tennessee Rules of Civil Procedure which bars a cause of action only on the taking of a third voluntary dismissal. Appellant further asserts that there exists an irreconcilable conflict between Tennessee Code Annotated § 28-1-105 and Rule 41.01 of the Tennessee Rules of Civil Procedure. Respondent submits that this question has been entirely resolved by the Tennessee Courts and this appeal is wholly without merit. Tennessee Code Annotated § 28-1-105, commonly referred to as Tennessee's "saving statute," formerly Tennessee Code Annotated § 28-1-106, has been considered several times by the Tennessee courts. Any question that may have once existed regarding the interpretation of this statute has long been settled. See, *Reed v. Cincinnati, N.O. & T.P. Ry. Co.*, 190 S.W. 458 (1916); *Turner v. N.C. & St.L. Railway*, 285 S.W.2d 122 (1955); *Balsinger v. Gass*, 379 S.W.2d 800 (1964); *Payne v. Matthews*, 633 S.W.2d 494 (Tenn.App.1982).

As the Tennessee Supreme Court correctly pointed out more than eighty years ago, after the taking of any non-suit to an original cause of action, any subsequent suits must be filed within one year from the date of the first non-suit to be within the purview of the savings statute. *Reed v. Cincinnati, N. O. & T.P. Railroad Co.*, 190 S.W. 458 (1916). In *Reed v. Cincinnati*, this court rejected the position advanced by Appellant that the saving statute gives the plaintiff the right to file any number of successive suits upon the same cause of action as long as each new action was commenced within one year from the date of the previous non-suit. *Id.* In *Reed*, the Tennessee Supreme Court held that, in order to be within the statute of limitations, the new action must be brought within one year after the termination of an action which was commenced within the statute of limitations. 190 S.W. at 459.

Even more recently, in *Payne v. Matthews*, the Court of Appeals addressed whether a conflict exists between T.C.A. § 28-1-105 and Rule 41.01 of the Tennessee Rules of Civil Procedure. In *Payne*, appeal was taken by plaintiff from an order of the Circuit Court, Shelby County, Alan E. Highers, J., granting defendant's motion for summary judgment and dismissing suit for personal injuries and property damage. The Tennessee Court of Appeals, Tomlin, J., held that: (1) regardless of how an inconclusive dismissal is had, in order for a suit to survive, it must have been filed within one year of the date of dismissal of the original action, and (2) third suit for same cause of action, filed more than one year after date of entry of order of dismissal for want of prosecution of first action, was properly dismissed notwithstanding

plaintiff had taken a voluntary non-suit in a second action filed within one year of date of dismissal. Even more specifically, the perceived conflict noted by plaintiff is resolved in *Payne* as follows: Tennessee Code Annotated § 28-1-105 addresses itself to *time* while Rule 41.01 of the Tennessee Rules of Civil Procedure addresses itself to *the number* of dismissals (non-suits) that can be taken. *Payne v. Matthews*, 633 S.W.2d at 495-496.

In this case, the plaintiff concedes that his case was not timely filed the *third* time. Further, the plaintiff's contention that an "average reasonable attorney" wouldn't properly understand the synthesis of the statute and rules of procedure is without merit. If plaintiff had consulted the cited treatises written by Professors Banks and Entman (*Tennessee Civil Procedure*, Section 9-29(b) 648 (1999)) and Donald Payne (*Sex, Lies and Nonsuits*), 29 Tenn. Bar Jour., No. 5; 17 (1993), perhaps he would have not voluntarily taken the second non-suit. The statutes and rules were available to counsel at all time. Claiming that he should not be responsible for acclimating himself to those statutes and rules is extremely reckless conduct. Further, to in any way intimate that plaintiff was denied any due process for not following a statute long in existence or not being able to proceed a third time on a lawsuit dismissed twice previously, is nothing short of ridiculous. Plaintiff cites to no authority even tangentially connecting the instant situation to precedent in this court or any other.

CONCLUSION

Based on the clear and indisputable facts and applicable case law, the trial court's award of summary judgment and subsequent affirmation by the appellate courts was not only proper, but mandated. The plaintiff, on his own accord, is the author of his own misfortune. Plaintiff's application for certiorari before this Court should be denied.

Respectfully submitted,

William B. Walk, Jr. (#13989)
The Hardison Law Firm, P.C.
119 South Main Street, Suite 300
Memphis, TN 38103
(901) 525-8776